502

SUPREME COURT OF THE UNITED STATES.

No. ~~106~~ 31

WILLIAM GAUSE, PLAINTIFF IN ERROR,

VERSUS

ARTHUR B. DAVIS.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF ALABAMA.

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The United States of America to the clerk of the district court of the United States for the southern district of Alabama, at Mobile, greeting:

Because, in the record and proceedings, and also in the rendering of judgment in a certain cause lately determined in our said district court, wherein Arthur B. Davis is plaintiff, and William Gause defendant, manifest error hath intervened, to the great damage of the said defendant, as by his complaint we are informed, and we being that the error, if any there be, should in due manner be corrected, and full and speedy justice done to the parties in this behalf, do command you that you send to the judges of our Supreme Court, distinctly and openly under your hand and seal, the record and proceedings in the cause aforesaid, with all things concerning the same, and this writ, so that they may have them before the Supreme Court at the City of Washington, in the District of Columbia, on the second Monday of Ja-

nuary, eighteen hundred and thirty-four, that the record and proceedings aforesaid being inspected, we may cause to be further done therein for correcting that error, what of right, and according to law, ought to be done.

Witness the honorable John Marshall, chief justice of the Supreme Court of the United States, this first Monday of January, in the year of our Lord one thousand eight hundred and thirty-three. Issued 27th December, 1833.

DAVID FILES, *Clk. So. Dist. Ala.*

December, 1833.

I do hereby certify that I have attached to the within writ of error the citation, exemplification of record, and bill of exceptions, in the cause lately depending and determined before said court, wherein Arthur B. Davis was plaintiff, and William Gause defendant. I do further certify that the said William Gause, with David Rippets and John G. Ashley, his sureties, have, on this 27th December, 1833, filed their bond in said cause.

DAVID FILES, *Clk.*

The United States of America, to the marshal of the United States for the southern district of Alabama:

You are hereby commanded to summon Arthur B. Davis, and Messrs. Gordon and Goldthwaite, his attorneys, to be and appear at the next term of the Supreme Court of the United States to be holden at the city of Washington on the second Monday of January, eighteen hundred and thirty-four, then and there to hear the record and proceedings in a certain cause lately depending and determined in the district court of the United States for the southern district of Alabama, at Mobile, wherein Arthur B. Davis was plaintiff, and William Gause defendant; in which said cause it was considered by the court that the said Arthur B. Davis, plaintiff, do recover against the said William Gause, defendant, the sum of three thousand four hundred and eighty seven dollars and ninety-nine cents, and then and there to receive what the said court shall order and adjudge in the premises. Herein fail not; and have you then and there this writ, with your doings thereon.

Given under my hand and seal, this twenty-fourth day of Decem-
[SEAL.] ber, in the year of our Lord one thousand eight hundred and thirty-three, at Mobile, in the district aforesaid.

WM. CRAWFORD, *Judge.*

Pleas had before the honorable the district court of the United States in and for the southern district of Alabama, at a term of said court begun and held in and for the said southern district of Alabama, before his honor, William Crawford, judge of said court, on the second Monday of December, in the year of our Lord one thousand eight hundred and thirty-three.

Be it remembered that, at the May term of the said court, begun and held in and for the said southern district of Alabama, before his honor, William Crawford, judge of said court, came Arthur B. Davis, bringing with him William Gause, by virtue of an original writ; which said writ is in the words and figures following, to wit:

UNITED STATES OF AMERICA:—*District Court of the United States for the southern district of Alabama.*

The President of the United States to the marshal of said district, greeting: You are hereby commanded to take the body of William Gause, who is a citizen of the State of Alabama, and him safely keep, so that you have him before the honorable the judge of the said court, at the place of holding said court, at Mobile, on the first Monday of May next, to answer unto Arthur B. Davis, who is a citizen of the State of Georgia, in a plea of trespass on the case, &c. to the damage of the said plaintiff of six thousand dollars. Herein fail not, and have you then and there this writ.

Witness the honorable William Crawford, judge of the said court,
[SEAL.] this second Monday of December, in the year of our Lord one thousand eight hundred and thirty-two.

Issued the second day of April, in the year of our Lord one thousand eight hundred and thirty-three.

Attest: DAVID FILES, *Clerk Sout. Dist. Ala.*

Endorsement.— Exchange for $3,000.

MONTGOMERY, *January 1st*, 1833.

Two months after date of this our only bill of exchange, pay to the order of William Gause the sum of three thousand dollars for value received, negotiable and payable at the Bank of Mobile, and charge the same to account of your obedient servant,

B. GORDON & Co.

To Messrs. O'CONNELL & BRENAU,
Merchants, Mobile.

This action is founded on a bill of exchange endorsed in blank by the defendant, and of which plaintiff is holder.

GORDON & GOLDTHWAITE,
Plaintiff's Attorneys.

Return.—Received 8th April, 1833; executed 8th April, 1833.

ROBT. L. CRAWFORD, *U. S. Marshal, by*
DAN. HUNTINGTON, *D. M.*

Narr. filed 11 May, 1833.

District Court of the United States for the southern district of Alabama, at Mobile, May term, 1833.

Arthur B. Davis, who is a citizen of the State of Georgia, by attorney, complains of William Gause, a citizen of the State of Alabama, in custody, &c., of a plea of trespass on the case.

For that whereas, heretofore, to wit, on the first day of January, 1833, at Montgomery, to wit, in the district aforesaid, certain persons using the name and style of B. Gordon & Co. made their certain bill of exchange in writing, bearing date the day and year aforesaid, and then and there directed the same to Messrs. O'Connell & Brenan, and thereby then and there requested the said O'Connell & Brenan, two months after the date thereof, to pay to the order of William Gause the sum of three thousand dollars for value received, negotiable and payable at the Bank of Mobile. And the

said Messrs. O'Connell & Brenan afterwards, to wit, on the day and year aforesaid, accepted the same, and the said defendant, to whom, or to whose order the payment of the said sum of money in the said bill of exchange specified was to be made, afterwards, and before the payment of the said sum of money, or any part thereof, endorsed the said bill, and then and there delivered the said bill of exchange, so endorsed aforesaid, to the said plaintiff.

And the said plaintiff avers that, afterwards, to wit, on the fourth day of March, in the year 1833, the said bill of exchange was duly presented and shown at the said Bank of Mobile, and payment thereof demanded according to the tenor and effect thereof, but that neither the said O'Connell & Brenan, nor the said B. Gordon & Co. nor the said defendant did, or would then, or at any time thereafter, pay the said sum of money therein specified, or any part thereof; of all which said several premises the said defendant had notice.

By means whereof, and by force of the statute in such case made and provided, the said defendant then and there became liable to pay to the said plaintiff the said sum of money in the said bill of exchange specified; and being so liable, the said defendant, afterwards, to wit, on the day and year last aforesaid, undertook, and then and there faithfully promised the said plaintiff well and truly to pay him the said sum of money above specified, when he, the said defendant, should be thereunto afterwards requested. Yet the said defendant, although often requested to do so, hath not yet paid the said sum of money, or any part thereof, to the damage of the said plaintiff six thousand dollars; and therefore they bring suit.

GORDON & GOLDTHWAITE,
Plaintiff's Attorneys.

Plea.—And the said William Gause, by Frederick S. Blount, his attorney, comes and defends the wrong and injury, when, &c., and saith, that he did not undertake or promise in manner or form, as the said Arthur B. Davis hath above thereof complained against him; and of this he puts himself upon the country, &c.

FRED. S. BLOUNT,
Defendant's Attorney.

Verdict.—And now, this day, that is to say, on this sixteenth day of December, in the year of our Lord one thousand eight hundred and thirty-three, being a day of the term of said district court, begun and held on the second Monday of December, in the year aforesaid, came the said parties, by their attorneys, whereupon also came the following jury, to wit: D. M. Witherspoon, H. Webb, Benjamin Chinney, W. H. Harrison, S. G. Field, F. J. W. Nelson, John Marrast, H. Sampson, R. Rivers, S. T Barnes, W. O. Coolidge, and J. B. Colburn, twelve good and lawful men, who, being elected, tried and sworn, upon their oaths do say, that we, the jury, do find for the plaintiff, and assess his damages at three thousand four hundred and eighty-seven dollars aud ninety-nine cents.

Judgment.—It is therefore considered by the court that the said Arthur B. Davis do recover against the said William Gause, defendant, the sum of three thousand four hundred and eighty-seven dollars and ninety-nine cents, the damages aforesaid, in form aforesaid, by the jury aforesaid assessed, together with his costs.

Bill of exceptions.

THE UNITED STATES:—*District Court for the southern district of Alabama, at Mobile, December term,* 1833.

ARTHUR B. DAVIS,
vs.
WILLIAM GAUSE.

Upon the trial of the causes of this title, the plaintiff produced in evidence a bill of exchange of the description contained in his declaration, and the protest of the notary public of the county of Mobile, stating that, on the 4th of April, 1833, he had made a presentment of the said bill of exchange at the Bank of Mobile in this city, and demanded payment thereof, which was then and there wholly refused; and that notices thereof he, on the following day, deposited in the post office for the defendant, directed to Montgomery, Alabama, which it was admitted was the residence of the party. But what notice was so sent, or whether any was sent further than the same, is shown by the protest, was not shown. But the court, upon the production of the act of the Legislature, in the following words, admitted the same as evidence:—"the protest of a notary public, which shall set forth a demand, refusal, non-acceptance, or non-payment of any inland bill of exchange, or other protestable security for money, or other thing, that legal notice, expressing in the said protest the time when given, of such fact or facts, was personally or through the post office, given to any of the parties entitled by law to notice, shall be evidence of the facts it purports to contain, and entitle the holder of such security to the damages he may be entitled to by law." To all of which the defendant, by his counsel, objected, but which objection was then and there by the court overruled. The defendant then offered Bryon Gordon, under the 4th and 5th sections of a law passed by the Legislature of this State, entitled "An act to regulate the rate of interest," passed Dec. 17, 1819, which said sections are in the words following: "And be it further enacted, That when any note or notes, bond or bonds, shall or may be upon or on account of any usurious contract, the same shall be void and of no effect, and the obligor or obligors forever exonerated from the payment of the same; and the obligor shall, or obligors shall be deemed by this act competent witnesses to prove the usurious consideration of any such bond or bonds, note or notes: Provided that this act shall not be so construed as to prohibit the sale of any such bond or bonds which may have been fairly and bona fide given, and not given for the purpose of evading the provisions of this act."

Sec. 5. And be it further enacted, That in all cases whatsoever, when any suit or action shall be brought in any court of record in this State, touching or concerning any usurious bond, specialty, promise, or agreement, the borrower or party to such usurious bond, specialty, contract, promise or agreement, from whom such higher rate of interest is or shall be taken, shall be a good and sufficient witness to give evidence of such offence: Provided, that if any person against whom such evidence is offered to be given, will deny, upon oath, in open court, the truth of what such witness offers to swear against him, then such evidence shall not be admitted. And if any witness shall forswear himself in any such matter, and be thereof lawfully convicted, he or she shall suffer all the pains and penalties by law inflicted on persons convicted of wilful and corrupt perjury, to prove that he, the said Gordon, obtained a loan of money upon the bill of exchange

upon which this action is founded, and that upon such loan of money, a greater amount than 8 per cent. was taken and reserved by one John W. Freeman, who, at the time, knew that it was made for the purpose of obtaining such a loan. The court held that the statute aforesaid, so far as it enabled the drawer of the bill of exchange to become a witness, was not obligatory upon this court, nor were its proceedings to be affected by it; and that the rule therein contained would not be adopted by this court; and the said Gordon was not admitted to testify in conformity with it. To which the defendant excepted by his counsel. But the court had adopted, by previous practice, the statute in relation to protests, which is set out in the bill of exceptions, and had refused in its previous practice to adopt the rule prescribed in the statute of March, 1819, in relation to the regulation of interest, so far as it related to the competency of the witness.

The defendant, after offering to release the said B. Gordon, drawer of the said bill, tendered him as a witness, to show that the bill of exchange upon which this action is founded was made for his accommodation; that it was done to enable him to obtain a loan of money from one John W. Freeman of Montgomery, Alabama; that he was advised that the bill was made for the purpose aforesaid, before the same was passed to him; and that it was discounted by him, at the rate of 22 per cent. per annum, which, it is admitted, is a usurious rate of interest. That Freeman is the agent of the Bank of Columbus, in the State of Georgia, and resides in Montgomery, Alabama; that his agency was created before the date of this transaction, for the purpose of discounting bills of exchange and promissory notes, and loaning the bills of the said bank; that the plaintiff is, and was at the commencement of this suit, cashier of the said bank, and carries on the suit for its benefit and on its behalf; that the bill aforesaid was purchased by Freeman for the bank at the rate before stated, and with the knowledge that it was made to enable him to borrow money, by disposing of the same. This court here decided that he was not a competent witness to impeach the validity of the said bill by his testimony to the facts above stated, and excluded his testimony from the jury.

The defendant then offered Gordon to testify to the facts before stated, and the further fact, that the consideration of this bill was paid to him, in part, in bills of the Bank of Columbus, in order that the defendant might avail himself of a provision of a statute in the following terms, admitted to be in full force and effect in Alabama: "That so much of the act entitled An act incorporating the St. Stephens Steamboat Company, passed the 10 February, 1818, as might, by construction, seem to authorize the said company, or its agents, to issue any tickets, orders, bills, or promissory notes of any value or description, be, and the same is hereby repealed and made void. And be it further enacted, that any person, body corporate, company, or association issuing any note for circulation as a bank note, without the authority of law, be fined in the sum of one hundred dollars, and imprisoned not more than six months;" which said act was passed by the Legislature of this State, 12 January, 1827, and entitled "An act to repeal in part an act passed at St. Stephens, Feby. 10, 1818, incorporating the St. Stephens Steamboat Company;" but he was excluded.

The defendant then offered John Gashly, the second endorser, to testify to the same facts; but he was by the court decided to be an incompetent witness.

The defendant then offered to prove by the said witness that the plaintiff had no interest in the said bill, nor any right to carry on this suit upon the same; that the billis, and has always been, the property of the Bank of Columbus, and that the name of the plaintiff has been used to give this court jurisdiction; which testimony was not permitted to go to the jury. For the admission of the protest as evidence as aforesaid, and for the exclusion of Bryon Gordon and John Gashly from testifying as aforesaid, and the refusal to hear the testimony aforesaid, the defendant, by his counsel, excepts and prays of the court to sign, seal, and certify this bill of exceptions, and make the same matters of record; all which is done accordingly.

WM. CRAWFORD, *Judge.* [SEAL.]

Clerk's certificate.

I, David Files, clerk of the said district court of the United States in and for the said southern district of Alabama, do hereby certify that the beforegoing eleven several pages contain, and are as full, true, and perfect exemplification of the record and proceedings in a certain cause lately pending and determined in the said court, wherein Arthur B. Davis was plaintiff, and William Gause defendant.

In testimony whereof, I have hereunto set my hand, and affixed the seal of the said district court, at office, in the city of Mobile, this twenty-fifth day of December, in the year of our Lord one thousand eight hundred and thirty-three.

DAVID FILES, *Clk.*
Southern Dist. Alabama.